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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1987

JERRY ROSENSTEIN and DONALD SANDERS, PETITIONERS

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in reversing the district court's order dismissing the petitioners' "indictment" because it was returned after the expiration of the grand jury's term?

II. Whether the statute that governs extensions of a special grand jury and provides that a grand jury's term may be extended upon the "entry of an order" can be read so as to eliminate that requirement?

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No.

In the Supreme Court of the United States October Term, 1987

JERRY ROSENSTEIN and DONALD SANDERS, PETITIONERS

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PRAYER

Petitioners Jerry Rosenstein and Donald Sanders respectfully pray that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals ("Op."), reversing the district court's order dismissing the indictment against

Rosenstein and Sanders, is reported at 841 F. 2d 1300 and is attached hereto in Appendix A. The opinion of the district court, dismissing the indictment, is attached hereto in Appendix B. The district court's order denying the government's motion for reconsideration is attached hereto in Appendix C.

JURISDICTION

On February 17, 1988, the United States Court of Appeals for the Seventh Circuit reversed the district court's order dismissing the indictment against Rosenstein and Sanders. The Seventh Circuit's ruling had the effect of reinstating prison sentences against Rosenstein and Sanders as they had pled guilty and were sentenced prior to the time that the district court dismissed the indictment. On March 2, 1988, Rosenstein and Sanders filed a timely petition for rehearing. The rehearing petition was denied on March 15, 1988. *See* Appendix D. This petition is filed within sixty days of the order denying the petition for rehearing and is thus timely. This Court's jurisdiction is invoked under 28 U.S.C. 1254.

STATUTE INVOLVED

Title 18, United States Code, section 3331, provides in pertinent part as follows:

> Section 3331. Summoning and term
>
> (a) In addition to such other grand juries as shall be called from time to time, each district court which is located in a judicial district containing more than four million inhabitants or in which the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, certifies in writing to the chief judge of the district that in his judgment a special grand jury is necessary because of criminal activity in the district shall order a special grand jury to be summoned at least once in each period of eighteen months unless another special grand jury is then

serving. The grand jury shall serve for a term of eighteen months unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by majority vote that its business has been completed. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (d) of section 3333 of this chapter.

(b) If a district court within any judicial circuit fails to extend the term of a special grand jury or enters an order for the discharge of such grand jury before such grand jury determines that it has completed its business, the grand jury, upon the affirmative vote of a majority of its members, may apply to the chief judge of the circuit for an order for the continuance of the term of the grand jury. Upon the making of such an application by the grand jury, the term thereof shall continue until the entry upon such application by the chief judge of the circuit of an appropriate order. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (3) of section 3333 of this chapter of the United States Code.

STATEMENT OF THE CASE

1. Grand Jury Proceedings

On December 2, 1983, the Special December 1983 Grand Jury, sitting in the Northern District of Illinois, convened pursuant to 18 U.S.C. 3331. Under this statute, the term of the special grand jury was to last eighteen months. 18 U.S.C. 3331(a). After the eighteen months passed, the entry of an order predicated upon a judicial determination that the business of the grand jury had not been completed was necessary to extend the grand jury's existence. *Id.*

Upon entry of such an order, the grand jury's term could be extended for another six months and could be extended in a similar fashion at the end of each six month period, up to a total of thirty six months service.[1] *Id.*

On May 25, 1985 and November 25, 1985, the chief judge of the Northern District of Illinois entered written orders, extending the Special December 1983 Grand Jury's existence for six months. Although the term of the Special December 1983 Grand Jury was scheduled to expire on May 25, 1986, an extension order was not entered prior to that time. Nonetheless, the Special December 1983 Grand Jury continued to function after May 25, 1986. One of the so-called "indictments" that it purported to return was the superseding one against Rosenstein and Sanders. In that "indictment," returned on September 22, 1986, Rosenstein and Sanders were alleged to have committed violations of 18 U.S.C. § 1962(d), 18 U.S.C. § 2314, 18 U.S.C. § 1962(c) and 18 U.S.C. § 371.

2. District Court Proceedings

On December 8, 1986, Rosenstein entered a guilty plea to counts one and eight of the superceding "indictment," charging him with RICO and conspiracy. Three days later, Sanders also entered a guilty plea to counts one and eight. On January 28, 1987, the district court sentenced Rosenstein and Sanders.[2] At the time of sentencing, the defendants lacked knowledge that a written order extending the term of the special grand jury had not been entered. The government, however, had such knowledge since the

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[1] In contrast, ordinary grand juries serve for eighteen months, although one six month extension may be granted in the "public interest." Fed. R. Crim. Pro. 6(g).

[2] Rosenstein was sentenced to a term of five years incarceration on count one, five years probation on count eight, consecutive to the prison term, and ordered to forfeit $ 150,000. Sanders was sentenced to eight years incarceration on count one, five

(Footnote continued on the following page)

issue came to light in an unrelated criminal case, *United States v. Patterson*, 666 F. Supp. 1137, 86 CR 847 (N.D. Ill. 1987), where the government had filed grand jury extension orders that failed to include an order extending the Special December 1983 Grand Jury's term in May, 1986. Further, internal government files that came to light during this litigation showed that the government consciously chose not to seek an extension of the Special December 1983 Grand Jury in May, 1986.

Upon learning of the failure to enter a written order extending the grand jury's term, Rosenstein and Sanders attacked their judgments and sentences. Rosenstein filed a motion to set aside conviction and vacate sentence pursuant to 28 U.S.C. § 2255. Sanders filed a "Motion To Dismiss Indictment And Vacate Judgment Of Conviction." Rosenstein and Sanders charged that the district court lacked jurisdiction to enter judgment and pass sentence because the body that purported to return the operative indictment was not a lawfully convened grand jury. In a memorandum opinion, the district court granted the defendants' motions to vacate. *See* Appendix B. Thereafter, the government filed a reconsideration motion which the district court denied in a written order. *See* Appendix C.

3. Seventh Circuit Proceedings

Subsequently, the government filed a notice of appeal. The Seventh Circuit, *sua sponte*, ordered the cases of Rosenstein and Sanders consolidated with the following cases: *United States v. Taylor*, *United States v. Nigo-Martinez*, *United States v. Clemenic*, and *United States v. Wilson*. In those cases, the defendants had attacked

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2 *(continued)*
years probation on count eight, consecutive to the prison term, and ordered to forfeit $ 30,000. At the time of sentencing, the remaining counts in the superceding indictment and all of the counts in the original indictment were dismissed.

their "indictments" on the same grounds as Rosenstein and Sanders.[3] In *Taylor* and *Nigo-Martinez*, the district courts upheld the indictments while the district judge in *Wilson* and *Clemenic* dismissed the indictments.

In its opinion, the Seventh Circuit rejected the position of Rosenstein and Sanders and thus upheld the validity of the grand jury notwithstanding the fact that a written order extending the grand jury's term had not been entered in May, 1986. The court's decision turned on an interpretation of 18 U.S.C. § 3331. The court interpreted this statute to only require a judicial determination that the grand jury had not completed its business. Op. at 4, 13-17. The Seventh Circuit thus ruled that § 3331 did not require the entry of a written order to extend the term of a special grand jury. Op. at 4, 13-17. Accordingly, the Seventh Circuit held that the failure to enter a written order extending the grand jury's term did not render the petitioners' indictment null and void. Op. at 4, 20. In a footnote, the court rejected the district court's finding that even if a judicial determination was all that § 3331 required to extend the grand jury's term, such a determination had not been made. Op. at 19 n. 16. As such, the court reversed the district court's order holding otherwise. Op. at 20. Rosenstein and Sanders now petition this Honorable Court to review the Seventh Circuit's decision.

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[3] The cases of Wilson, Rosenstein and Sanders involved the legality of the Special December 1983 Grand Jury. The other cases before the Seventh Circuit involved the Special October 1983 Grand Jury where the same error was alleged to have occurred.

REASONS FOR GRANTING THE PETITION

I. THIS PETITION SHOULD BE GRANTED TO UPHOLD THE RULE OF LAW; IN A FIT OF JUDICIAL ACTIVISM AND IN AN EFFORT TO SAVE A MULTITUDE OF CRIMINAL INDICTMENTS, THE SEVENTH CIRCUIT DISTORTED, REWROTE AND MISCONSTRUED THE UNAMBIGUOUS REQUIREMENTS OF THE GRAND JURY EXTENSION STATUTE AND DUBIOUSLY RELIED ON A REVISIONIST COURT ORDER AND A LEGISLATIVE HISTORY WHICH SHOULD NOT HAVE BEEN CONSIDERED AND DID NOT SUPPORT ITS RESULT.

This case presents the important issue of whether the failure to enter an order extending the term of a special grand jury deprives that body of authority to return valid indictments.[4] The Seventh Circuit determined that the failure to enter a written order extending the grand jury's term did not deprive the grand jury of its authority. In reaching this result, the court construed the language of the statute as only requiring a judicial determination that the business of the grand jury had not been completed and not requiring the entry of a written order.

In pertinent part, the statute at issue provides:

> The grand jury shall serve for a term of eighteen months unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by majority vote that its business has been completed. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has

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[4] During oral argument before the Seventh Circuit, the United States Attorney for the Northern District of Illinois estimated that 150-200 indictments would be affected by the court's decision.

> not been completed, the court may *enter an order* extending such term for an additional period of six months. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of § 3333 of this chapter.

18 U.S.C. § 3331 (a) (emphasis added).

From this plain language, it is evident that the entry of an order predicated upon a judicial determination that the business of the grand jury has not been completed is necessary to extend a special grand jury's existence. *United States v. Gillespie* F. Supp. 1137 (N.D. Ill. 1987). The Seventh Circuit, however, ignored the plain language and found that "§ 3331 does not require a written entry to effect the extension of a special grand jury's term." Op. at 12. In so holding, the court disregarded well-established principles of statutory construction established by this Honorable Court. For example, while "[i]t is axiomatic that the starting point . . . is the language itself", *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976), and absent ambiguity, the statute must be interpreted according to its plain meaning, the Seventh Circuit vitiated the statute's unambiguous requirement that the court "enter an order" to extend a special grand jury's term.

Furthermore, the Seventh Circuit's interpretation of the statute failed to give effect to all of the statute's provisions and rendered the statute's explicit requirement that the court "enter an order" useless and surplusage.[5] Also, the court's construction completely obviated paragraph b of § 3331. This portion of the statute sets forth the procedures to be followed in the event that the term of a special grand jury, like the special grand jury in this case, is not

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[5] By ruling that the statute does not require the entry of a written order, the Seventh Circuit also ignored Rule 55 of the Federal Rules of Criminal Procedure. This Rule provides that "the clerk shall enter in the records each order or judgment of the court and the date such entry is made." Fed. R. Crim. Pro. 55.

extended. Logically, upon realizing that the grand jury's term was not properly extended, one would have to turn to § 3331(b) to determine whether the appeal procedures set forth therein were followed. Admittedly, these procedures were not followed after the chief judge failed to extend the term of the Special December 1983 Grand Jury in May, 1986. As such, the life of the Special December 1983 Grand Jury clearly terminated. However, in holding otherwise, the Seventh Circuit judicially eliminated portions of the statute that did not support its result. Such interpretation stands in clear violation of unequivocal rules of statutory construction established by this Honorable Court, *see, e.g., Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307-08 (1961), and *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (statute must be interpreted so as to give effect to all of its terms; statute cannot be interpreted so as to render some of its terms useless), and cannot be countenanced or condoned.[6]

In reaching its result, the Seventh Circuit also looked to the "history and purpose" of § 3331. Op. at 14. The legislative history, however, does not support the court's holding -- the issue presented in this case simply was not broached during the legislative debates. In short, the decision below -- saving a multitude of indictments at the expense of the rule of law -- is predicated on a suspect reliance on legislative history. As this Honorable Court has taught, a legal analysis that dubiously relies on legislative history to rationalize an otherwise unjustifiable result should be spurned. *See Gemsco, Inc. v. Walling*, 324 U.S. 244, 260 (1945) ("The plain words and mean-

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[6] In addition, the Seventh Circuit, in distorting the plain language of the grand jury extension statute in its effort to save a multitude of criminal indictments, ignored its own prior statement that a grand jury term of service requirement "must be scrupulously adhered to." *United States v. Lang*, 644 F.2d 1232, 1235 (7th Cir.), *cert. denied*, 454 U.S. 870 (1981).

ing of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction."). Furthermore, in light of the plain language of § 3331, it was improper, as this Honorable Court has taught, for the Seventh Circuit to consider legislative history. *United States v. Turkette*, 452 U.S. 576, 580 (1981); *Ex Parte* Collett, 337 U.S. 55, 61 (1949).

In addition to ignoring cardinal rules of statutory construction, the Seventh Circuit engaged in a faulty and dangerous legal analysis by relying on what has been characterized as Chief Judge McGarr's *nunc pro tunc* order.[7] (The government successfully prevailed upon the chief judge to enter this order after the grand jury polemic came to light.) The Seventh Circuit used this order to resolve whether the chief judge had made the determination necessary to extend the term of the Special December 1983 Grand Jury in May, 1986. Op. at 18. The order in question amounted to no more than the chief judge's *post hoc* recollections based on the *ex parte* urging of the government. Absent objective extension of the grand jury, however, judicial recollections of "intentions" are irrelevant and a legal analysis that relies on such must be rejected. If a revisionist order, or an order indicative of good intentions, can remedy constitutional or statutory violations, albeit they may have been done by inadvertence or mistake, then Pandora's box to the emasculation of the Bill of Rights and congressional mandates is opened: A police officer could go rummaging through a man's home absent probable cause or a warrant and later cure the violation by stating that his "intentions" were good. Similarly, a defendant could fail to file a notice

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[7] Judge McGarr was the chief judge in the Northern District of Illinois during the period of the special grand jury's service and was responsible for "extending" (or not extending) the term of the special jury.

of appeal within ten days from sentence, file it nine months later and be in court via a court order, justified on the premise that the "intentions" of the defendant's attorney were good -- that he intended to file the notice and had it sitting on his desk but his law clerk forgot to file it. Of course, reliance on "intentions" in such instances would be unavailing. Rights cannot be put at the mercy and control of "intentions" as opposed to objective actions or inactions. In this case, the same should hold true. Accordingly, the Seventh Circuit's reliance on the chief judge's belief that the grand jury was "properly extended" was clearly erroneous. *Post hoc* judicial recollections simply cannot cure a charging document that was not returned by an body that was not *objectively* authorized at the time it acted. The Seventh Circuit has held to the contrary. This petition should be granted to rectify its patently flawed and dangerous reasoning.

In examining the Seventh Circuit's opinion, the fallacy of its logic continues beyond the foregoing points. For example, even accepting the Seventh Circuit's conclusion that § 3331 only requires a judicial determination to effectuate an extension of a special grand jury, the court's decision is nonetheless erroneous. Here, the district court examined the relevant materials and made an explicit factual finding that § 3331's requirement that the court determine that the business of the grand jury was unfinished had not been met. *United States v. Bills*, minute order denying government's motion for reconsideration, (N.D. Ill. June 11, 1987) (Hart, J.); Appendix D. On appeal, however, the Seventh Circuit blithely disregarded this factual finding. And, in so doing, it gave short shrift to the proposition that a district judge's factual findings must be accorded deference on review. *See, e.g.*, Fed. R. Civ. Pro. 52(a). Such reasoning stands in defiance of well-established standards and cannot be tolerated.

We also must note that the court's decision is somewhat at odds with the Second Circuit's decisions in *United States v. Fein*, 504 F. 2d 1170 (2nd Cir. 1974) and *United States v. Macklin*, 523 F. 2d 193 (2nd Cir. 1975). In those cases, the court held that the failure to extend the term of a grand jury rendered "indictments" returned by the once valid grand jury invalid. The court below, however, found the cases "inapplicable" because it found that "the grand juries *were* properly extended." Op. at 16. In addition, the court found the cases "inapposite" since the grand juries involved in *Fein* and *Macklin* were eighteen month grand juries whereas here the grand jury could sit for a maximum of thirty six months. The distinctions made by the court are insignificant and meaningless. First, as noted above, the grand jury was not properly extended. Second, the fact that a special grand jury can sit for a maximum period of thirty six months is inconsequential to the analysis in this case. Section 3331 expressly provides that "[t]he grand jury shall serve for a term of eighteen months . . ." 18 U.S.C. § 3331(a). Upon the completion of the eighteen months, the term of the grand jury *expires* unless an extension order is entered. The fact that the grand jury could have sat for a maximum of thirty six months simply cannot alter congressionally mandated extension requirements and the Seventh Circuit's holding to the contrary is nothing more than a court perverting clear statutory language to save indictments at the expense of the rule of law.[8]

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[8] By a result orientated analysis that mangled § 3331's plain requirements, the Seventh Circuit avoided two dispositive considerations. First, a valid grand jury is an essential component of the district court's jurisdiction. *See, e.g., Ex Parte* Bain, 121 U.S. 1, 12-13 (1887); *Ex Parte* Wilson, 114 U.S. 417 (1885); *United States v. Armored Transport, Inc.*, 629 F. 2d 1313, 1316 (9th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981); *United States v. Hill*, 26 Fed.Cas. 315, 317 (No. 15,364) (C.C. Va. 1809); *United States v. Macklin*, 523 F. 2d 193 (2nd Cir. 1975). Second, the law does not recognize de facto grand juries. *See, e.g., United States v.*

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In sum, the Seventh Circuit's decision in this case represents judicial activism at its worst. *See Gillespie*, 666 F. Supp. 1137 (for extended criticism of the reasoning ultimately adopted by the Seventh Circuit). The holding rests on patent ignorance of statutory construction principles and constitutes unauthorized creative rewriting of a statute. The prior decisions of this Honorable Court and rule of law, however, forbid the analysis employed below. Or, as recently emphasized by District Judge Milton I. Shadur in addressing the question of whether the possibility of inconvenience should blind the court's eyes to the lack of a valid grand jury, "But what of the inconvenience (surely a euphemism) to defendants who are serving prison terms under void indictments -- imprisoned without due process of law in the classic sense? Like all rhetorical questions, that one need only be asked -- it provides its own answer." *Id.* at 1138. And, as eloquently noted by the Second Circuit in *Fein*:

> We are, of course, fully cognizant of the fact that our decision here constitutes much more than an academic discussion and that other indictments will be dismissed on the basis of this opinion. It may well be that criminal proceedings which would be in the public interest will be frustrated and that those who might be found guilty will escape conviction. However, it is fundamental to our jurisprudence that the rule of law must prevail.

504 F. 2d 1180-81.

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8 *(continued)*

Johnson, 123 F. 2d 111, 120 (7th Cir. 1941), *rev'd on other grounds*, 319 U.S. 503 (1943); *Macklin*, 523 F. 2d at 195; *Fein*, 504 F.2d at 1177; *United States v. McKay*, 45 F. Supp. 1007, 1015 (E.D. Mich. 1942). Thus, given the legitimacy of the foregoing propositions, had the Seventh Circuit interpreted § 3331 properly, dismissal of the petitioners' "indictment" would have been required.

Based on the foregoing, it is clear that the term of the Special December 1983 Grand Jury was not properly extended in May, 1986 and thus its life "terminated under the clear language of the governing rule." *Id.* at 1173. The Seventh Circuit's reasoning in this case flies in the face of established rules of statutory construction and is dangerous for obvious reasons. Consequently, this petition should be granted so that this Honorable Court can correct the errors below and therefore uphold the rule of law.

CONCLUSION

WHEREFORE, Petitioners Jerry Rosenstein and Donald Sanders respectfully pray that this Honorable Court grant this petition and issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 87-1378

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALBERT TAYLOR,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 CR 232—**James F. Holderman**, *Judge.*

Nos. 87-2099 and 87-2100

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTONIO NIGO-MARTINEZ and SALVADOR JARABA,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 86 CR 528 and 86 CR 499—**Prentice H. Marshall**, *Judge.*

(caption continued on following page)

No. 87-2021

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

PAUL CLEMENIC,

Defendant-Appellee.

No. 87-2022

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

JERALD WILSON,

Defendant-Appellee.

No. 87-2023

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

JERRY ROSENSTEIN and DONALD SANDERS,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 86 CR 727, 86 CR 828 and 86 CR 339—
William T. Hart, *Judge.*

ARGUED NOVEMBER 13, 1987—DECIDED FEBRUARY 17, 1988

Before POSNER, FLAUM, and KANNE, *Circuit Judges.*

FLAUM, *Circuit Judge.* This consolidated appeal, involving six separate criminal cases, requires us to resolve what has become known in the Northern District of Illinois as the "grand jury issue." In February of 1987, the office of the United States Attorney discovered that the records of the clerk's office did not contain a written order extending the Special December 1983 Grand Jury beyond its initial 18 month term. Subsequent investigations discovered similar omissions in the records of the Special October 1984 and Special January 1985 Grand Juries.

Several defendants indicted by these bodies contend that their indictments are nullities because the putative special grand juries were not properly constituted when they returned these indictments. The government argues that the omission of a written extension order is not error under 18 U.S.C. § 3331,[1] the statute regulating the summoning

[1] Section 3331. Summoning and term

(a) In addition to such other grand juries as shall be called from time to time, each district court which is located in a judicial district containing more than four million inhabitants or in which the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, certifies in writing to the chief judge of the district that in his judgment a special grand jury is necessary because of criminal activity in the district shall order a special grand jury to be summoned at least once in each period of eighteen months unless another special grand jury is then serving. The grand jury shall serve for a term of eighteen months unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by majority vote that its business has been completed. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of section 3333 of this chapter.

(Footnote continued on following page)

and term of special grand juries. We hold that the § 3331 extension provision requires only a judicial determination that a special grand jury has not finished its business. The record indicates that this determination was made prior to all but one period of extension of the affected special grand juries; we cannot ascertain on this record whether the Special October 1984 Grand Jury was properly extended for a second time in October of 1986. Accordingly, we hold that the failure to enter formal written orders of extension was not error, and that the indictments against all of the defendants except Clemenic are therefore valid.

I.

The six cases before us involve the Special December 1983 Grand Jury (the "1983 Grand Jury") and the Special October 1984 Grand Jury (the "1984 Grand Jury").[2] Chief Judge McGarr ordered the 1983 Grand Jury convened on December 2, 1983. On May 25, 1985, before its original

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[1] *continued*

(b) If a district court within any judicial circuit fails to extend the term of a special grand jury or enters an order for the discharge of such grand jury before such grand jury determines that it has completed its business, the grand jury, upon the affirmative vote of a majority of its members, may apply to the chief judge of the circuit for an order for the continuance of the term of the grand jury. Upon the making of such an application by the grand jury, the term thereof shall continue until the entry upon such application by the chief judge of the circuit of an appropriate order. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of section 3333 of this chapter.

[2] Although no indictments returned by the Special January 1985 Grand Jury are before us on this appeal, we note that the facts surrounding that Special Grand Jury's extension are nearly identical to those involved in the May, 1986 extension of the Special October 1984 Grand Jury which today we hold valid.

18 month term expired,[3] the Chief Judge extended the Grand Jury's term pursuant to 18 U.S.C. § 3331. This constituted the first of three such six month extensions authorized by the statute. On November 25, 1985, Chief Judge McGarr again extended the 1983 Grand Jury, this time until June 2, 1986.[4] Prior to the termination of this second extension, the U.S. Attorney never presented, and the Chief Judge never signed, a third formal written order of extension. However, the 1983 Grand Jury continued to meet and return indictments, and was instructed on several occasions by Chief Judge McGarr to "resume deliberations."[5]

Defendants Wilson, Rosenstein and Sanders were each convicted on the basis of indictments returned after the expiration of the 1983 Grand Jury's second six month extension.[6] These defendants contend that the 1983 Grand

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[3] The term of a grand jury starts on the date of impanelment, which is the date it is first convened. *See United States v. Armored Transport*, 629 F.2d 1313, 1316-17 (9th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981). The 1983 Grand Jury was convened on December 2, 1983. Acting Chief Judge Marshall entered an order on September 10, 1984 calling for a Special October 1984 Grand Jury to be convened. It is not clear from the record, however, on which date in October the 1984 Grand Jury was actually convened. As we discuss below, we must remand for a determination of when the 1984 Grand Jury began its service.

[4] On May 25 and November 25, 1985, Judge McGarr entered written orders extending the 1983 Grand Jury "until further notice." These constituted valid extensions under the statute.

[5] The record on appeal indicates that Judge McGarr accepted the 1983 Grand Jury's indictments and told it to resume deliberations on April 28, May 5, May 12, June 2, June 9, and June 16, 1986. The Grand Jury returned indictments against defendants Rosenstein, Sanders and Wilson in the fall of 1986. *See infra* note 6.

[6] On September 22, 1986, the 1983 Grand Jury returned a superseding indictment against Rosenstein, Sanders and others charging them with conspiracy to steal, dismantle and transport automobiles and parts in violation of the Racketeering Influenced and Corrupt

(Footnote continued on following page)

Jury was not properly extended for the third of its three statutorily authorized extensions. Thus, they allege that its power to return indictments lapsed in June of 1986, thirty months after its impanelment, rather than in December of 1986, a full three years after it was convened.

Defendants Taylor, Nigo-Martinez, Jaraba, and Clemenic were indicted by the 1984 Grand Jury. They contend that this Grand Jury was never validly extended beyond its original 18 month term, and that its power to indict therefore lapsed in April of 1986. The October 1984 Grand Jury was convened pursuant to an order of Acting Chief Judge Marshall.[7] During its first 18 months, the Grand Jury returned indictments against many defendants, including original and superseding indictments against Taylor charging various narcotics-related offenses. In March of 1986, before the expiration of its initial 18 month term, the Grand Jury voted unanimously to continue its work;[8] however, no formal order of extension was ever entered. The 1984 Grand Jury continued to appear weekly before Judge

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[6] *continued*
Organizations ("RICO") statute. Both Rosenstein and Sanders plead guilty in December of 1986, and were sentenced in January of 1987 by Judge Hart to eight years imprisonment plus five years probation. Defendant Wilson was indicted by the 1983 Grand Jury on November 17, 1986 for false statements and obstruction of justice. A jury convicted Wilson on all counts. In March and April of 1987, after the "grand jury issue" surfaced, Wilson, Rosenstein and Sanders each moved to dismiss his indictment and vacate his conviction. Judge Hart granted these motions on May 28, 1987.

[7] *See supra* note 3.

[8] No minutes or transcript of such a vote are routinely made by the grand jury. However, on February 24, 1987, the members of the special grand jury were reconvened and asked as a group if they recalled a vote to extend in March 1986. Everyone who had been a member of the special grand jury in March 1986 remembered voting to extend.

United States v. Smith, No. 86 CR 272, slip op. at n.2 (N.D. Ill. May 20, 1987).

McGarr (and later Judge Grady) until February of 1987, ten months after the end of its initial 18 month term.[9]

After discovering the lack of written orders extending the 1983 and 1984 Grand Juries, the United States Attorney's office prepared corrective orders which Judge McGarr signed. In the case of the Special December 1983 Grand Jury, Judge McGarr issued an order on February 21, 1987 finding that in May of 1986 he had determined that the 1983 Grand Jury had not completed its work.[10]

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[9] In its final ten months, the 1984 Grand Jury returned sixty indictments against over one hundred defendants. *Smith*, No. 86 CR 272, slip op. at 2. The Grand Jury returned indictments almost every week in April and May, once in June, every week in July and approximately 3 weeks out of every month during the remainder of 1986. *Id.* at 3 & n.3.

Four of the defendants indicted by the 1984 Grand Jury between April of 1986 and its discharge in February of 1987 have pursued this appeal. The Grand Jury handed down a second superseding indictment against Taylor on August 26, 1986 adding charges of using a telephone to facilitate narcotics offenses. Taylor plead guilty to four counts of his second superseding indictment and was sentenced by Judge Holderman on February 25, 1987 to eight years in jail plus five years probation. Nigo-Martinez and Jaraba were each charged on July 22, 1986 with conspiracy to possess and distribute cocaine. They were each found guilty by a jury, and on June 29, 1987 Judge Marshall denied their motions to vacate the convictions. Clemenic was initially indicted on October 14, 1986. A second superseding indictment, returned January 13, 1987, alleged that Clemenic had engaged in a fraudulent scheme to obtain money from customers of his computer company. He was brought to trial on these charges and convicted by a jury on 11 of 15 counts. Judge Hart vacated his conviction in May of 1987 after the "grand jury issue" surfaced.

[10] ORDER

On motion of the UNITED STATES OF AMERICA, by ANTON R. VALUKAS, United States Attorney for the Northern District of Illinois, the Court finds as follows:

1. On December 2, 1983, this Court entered an order calling for a special grand jury to be convened under 18 U.S.C. § 3331(a). Pursuant to that order, the Special December 1983 Grand Jury was convened in December 1983.

(Footnote continued on following page)

[10] *continued*

2. On May 25, 1985, this Court entered an order extending the grand jury's term of service beyond its original term of eighteen months. Under 18 U.S.C. § 3331(a), the effective term of the extension order was for six months.

3. On November 25, 1985, this Court entered an order extending the grand jury's term of service for an additional period of six months.

4. Prior to May 25, 1986, the Special December 1983 Grand Jury voted unanimously to extend its term of service for an additional period of six months. The grand jury informed the clerk of its decision, and instructed the clerk to present a motion for a judicial order of extension.

5. As Chief Judge for the District Court of the Northern District of Illinois, I was familiar with the volume of business being conducted before the Special December 1983 Grand Jury in the period prior to May 1986.

6. In the six months following the grand jury's May 1986 vote to extend its term of service, the Special December 1983 Grand Jury appeared before me on numerous occasions to return indictments and to conduct other business. On all of these occasions, I considered the grand jury to be a properly extended special grand jury, and I treated it as such.

7. I determined prior to May 25, 1986, that the grand jury had additional matters to transact, had not yet completed its business, and should therefore be extended another six months.

8. Based on my dealings with the Special December 1983 Grand Jury, I find that it was my intention in May 1986 to order that the grand jury continue to serve for an additional six months. This conclusion is supported by the fact that between May and December 1986 I considered the grand jury to be a properly extended grand jury, and I treated it as such.

9. The Clerk of the District Court for the Northern District of Illinois has been unable to locate a May 1986 judicial order extending the term of service of the Special December 1983 Grand Jury.

10. It now appears that, through inadvertence or mistake, the Clerk of the Grand Jury may have failed to present a motion to extend the term of the Special December 1983 Grand Jury beyond May 1986.

11. In view of my contemporaneous determination that the grand jury had not completed its business, and in view of my in-

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In the case of the Special October 1984 Grand Jury, Judge McGarr issued an order on March 3, 1987 finding that in March of 1986 he had determined that the 1984 Grand Jury had not completed its work.[11] In addition to setting

[10] *continued*
tention to allow the grand jury to serve for an additional six months, I find that any failure to enter an extension order was non-substantive and ministerial.

12. In order that the record may "speak the truth" and reflect accurately my original intentions and understandings, it is necessary that I enter an order *nunc pro tunc* extending the term of service of the Special December 1983 Grand Jury.

13. THEREFORE, IT IS HEREBY ORDERED that the Special December 1983 Grand Jury be extended from May 25, 1986 to November 25, 1986.

14. Based on the *nunc pro tunc* order of extension entered herein and based on the other findings I have made in this order, I further find and hold that the validity of all the indictments returned by the Special December 1983 Grand Jury during the period May 25, 1986, to November 25, 1986, is not affected by any failure to enter an extension order in May 1986.

/s/ Frank J. McGarr

Feb. 21, 1987

[11] ORDER

On motion of the UNITED STATES OF AMERICA, by ANTON R. VALUKAS, United States Attorney for the Northern District of Illinois, the Court finds as follows:

1. On September 10, 1984, Acting Chief Judge Prentice Marshall entered an order calling for a special grand jury to be convened under 18 U.S.C. §§ 3331(a) and 3332(b). Pursuant to that order, the Special October 1984 Grand Jury was convened in October 1984.

2. In March 1986, the Special October 1984 Grand Jury voted unanimously to extend its term of service for an additional period of six months. The grand jury informed the deputy clerk of its decision, and instructed the deputy clerk to present a motion for a judicial order of extension. A motion to extend the grand jury was prepared by the United States Attorney's Office.

3. The foreman and other members of the Special October 1984 Grand Jury recall that they appeared before this Court in March

(Footnote continued on following page)

[11] *continued*

1986, and that at that time this Court extended the grand jury's term of service.

4. The Court recalls that in March 1986 the Special October 1984 Grand Jury appeared before the Court, and the Court extended the grand jury's term of service.

5. As Chief Judge for the District Court of the Northern District of Illinois, I was familiar in March 1986 with the volume of business being conducted before the Special October 1984 Grand Jury.

6. In the six months following the Court's March 1986 extension of the grand jury's term of service, the Special October 1984 Grand Jury appeared on numerous occasions before this Court to return indictments and to conduct other business. This Court also entered orders substituting grand jurors to allow the grand jury to continue operations. On all of these occasions, the Court considered the grand jury to be a properly extended special grand jury, and the Court treated it as such.

7. The Court determined in March 1986, that the grand jury had additional matters to transact, had not yet completed its business, and should therefore be extended another six months.

8. Based on the Court's dealings with the Special October 1984 Grand Jury, and the Court's own recollections, the Court finds that it intended to, and did in fact order in March 1986 that the Special October 1984 Grand Jury continue to serve for an additional six months. This conclusion is supported by the fact that between March and September 1986 the Court considered the grand jury to be a properly extended grand jury, and it treated the grand jury as such.

9. The Clerk of the District Court for the Northern District of Illinois has been unable to locate a March 1986 judicial order extending the term of service of the Special October 1984 Grand Jury.

10. It now appears that, through inadvertence or mistake, a written extension order was not presented to, or executed by the Court, or that such an order was executed and has since been lost.

11. In view of the Court's contemporaneous determination that the grand jury had not completed its business, and in view of the Court's recollection that it extended the grand jury's term of service, the Court finds that any failure to enter a written extension order was non-substantive and ministerial.

(Footnote continued on following page)

forth Judge McGarr's factual findings, both of these orders purported to amend the records of the respective Grand Juries *nunc pro tunc* to reflect the entry of the extension orders on the proper dates.

II.

In this appeal, the government first argues that the absence of a formal order extending the Grand Juries was not a defect, because the applicable statute requires only a judicial finding that a special grand jury has not completed its work. Since there is evidence that such a judicial determination was made with respect to both Grand Juries at issue, the government asserts, the indictments and subsequent convictions are valid. Second, even if the absence of a written order is a defect, the government contends that it is a defect in the institution of the proceedings or in the indictment, and any objection was therefore waived under Federal Rule of Criminal Procedure 12(b) because defendants failed to raise this issue before trial. The government asserts that Federal Rule of Crim-

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[11] *continued*

12. In order that the record may "speak the truth" and reflect accurately the Court's original intentions and orders, it is necessary that the Court enter an order *nunc pro tunc* extending the term of service of the Special October 1984 Grand Jury.

13. THEREFORE, IT IS HEREBY ORDERED that the Special October 1984 Grand Jury be extended from March 25, 1986 to September 25, 1986.

14. Based on the *nunc pro tunc* order of extension entered herein and based on the other findings the Court has made in this order, the Court further finds and holds that the validity of all the indictments returned by the Special October 1984 Grand Jury during the period March 25, 1986, to September 25, 1986, is not affected by any failure to enter a written extension order in March 1986.

ENTER

/s/ Frank J. McGarr

DATED: [March 3, 1987]

inal Procedure 12(b) creates a distinction between waivable defects in personal jurisdiction, which protects individuals, and non-waivable defects in subject matter jurisdiction, which restricts the types of cases a court is empowered to hear. The government urges that as long as the indictment charges a federal crime—thereby showing subject matter jurisdiction in the court under Federal Rule of Criminal Procedure 12(b)(2)—it is valid unless the defendant objects to it before trial.[12] Finally, the government asserts that even if defendants could show cause as to why they failed to object prior to trial, any error was harmless in light of defendants' subsequent convictions.

The defendants, some of whom are appellants and some of whom are appellees, contend that no special grand jury is properly extended without entry of an order; that even if a judicial determination is sufficient under the statute, none was made here; that the courts below therefore lacked jurisdiction; that any objections therefore could not have been waived; and that harmless error analysis is inapplicable where jurisdiction is lacking.

Because we conclude that 18 U.S.C. § 3331 does not require a written entry to effect the extension of a special grand jury's term, we hold that as to all but one defendant no error has occurred. We therefore do not reach the waiver and harmless error issues.

III.

The special grand jury is a creature of statute. *United States v. Lang*, 644 F.2d 1232, 1235 (7th Cir.), *cert. denied*, 454 U.S. 870 (1981). An examination of the language and purpose of 18 U.S.C. § 3331 compels our conclusion that the mere omission to enter a written extension order does not affect the status of an extended special grand jury. The relevant language reads:

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[12] *See United States v. Wilson*, 434 F.2d 494 (D.C. Cir. 1970); *United States v. Mitchell*, 389 F. Supp. 917 (D.D.C. 1975), *modified on other grounds*, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977).

> The grand jury shall serve for a term of eighteen months. . . . If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No special grand jury term so extended shall exceed thirty-six months. . . .

18 U.S.C. § 3331(a). Our approach to interpreting this language cannot be one of "slavish literalism. . . . We reject a view that would make 'a fortress out of a dictionary,' remembering instead that 'statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.' " *United States v. Rabb*, 680 F.2d 294, 296 (3d Cir.), *cert. denied*, 459 U.S. 873 (1982) (*quoting Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.) (Learned Hand, J.), *aff'd*, 326 U.S. 404 (1945)). We agree with Judge Plunkett's careful analysis in *United States v. Smith*, No. 86 CR 272 (N.D. Ill. May 20, 1987), that to extend a special grand jury the statute requires only that the district court overseeing its activities make a determination that the grand jury has not finished its business. If the court finds that the grand jury still has work to do, the statute itself authorizes the extension. The law thus requires only this judicial determination—not the ministerial act of memorializing it by formal order—to effect the valid extension of a special grand jury.

Our interpretation of the extension provision of § 3331(a) is supported by our reading of the statute as a whole. *See id.*, slip op. at 6-7. Although subject to a degree of judicial supervision, § 3331 allows special grand juries substantial independence in fulfilling their duties. This independence is incompatible with a provision that would allow an inadvertent clerical omission to cripple the grand jury. Both sections of § 3331 reflect the special grand jury's relative autonomy. Under § 3331(a), a special grand jury may not be discharged before it has served 18 months unless the grand jury itself determines that it has finished

its business, and the judge then enters an order for its discharge. The judge merely ratifies the grand jury's determination. Under § 3331(b), if the judge fails to wait for the grand jury's determination and tries to discharge it early, or if he fails to extend the grand jury's term when its business remains unfinished, the statute protects against his arbitrary or erroneous action. The grand jury by majority vote can appeal the district judge's action or failure to act to the chief judge of the circuit. Pending the chief judge's order, the grand jury continues to serve. Significantly, although § 3331(b) contemplates the entry of an order in the case of the *discharge* of a grand jury as a final judicial step after the grand jury's own determination has been made, it mentions no such requirement in the case of an *extension*.[13]

The history and purpose of § 3331 militate against a reading of the statute which would allow the mere failure to enter a formal extension order to prematurely terminate the life of a special grand jury. Our review of the relevant legislative history leads us to adopt Judge Plunkett's analysis in *Smith*:

> The section was enacted as one small part of the Organized Crime Control Act of 1970, and was, like several other of the Act's provisions, designed to provide law enforcement authorities with more effective tools in the fight against organized crime. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 923 (1970) (Statement of findings of purpose). Title I of the Act, of which § 3331 is a part, was designed to enhance the powers of grand juries investigating organized crime by ensuring that a sufficient number of grand juries would be available to accommodate the needs of the particular district, by

[13] Section 3331(b) reads: "If a district court within any judicial circuit *fails to extend* the term of a special grand jury or *enters an order for the discharge* of such grand jury. . . ." (emphasis added).

permitting the special grand juries to serve for longer periods, and by giving them a greater degree of autonomy from the courts. [*See* 116 Cong. Rec. 35,290, 35,313, 35,321, 35,328, 35,332, 36,293.] While the House version of § 3331 (the version eventually enacted) amended the Senate version to retain *some* control by the district court over the special grand juries, *see* H.R. Rep. No. 1549, 91st Cong., 2d Sess. 32, *reprinted in* 1970 *U.S. Code Cong. & Admin. News* 4007, 4007, it is evident from the debates in the House that a major concern of the drafters was that grand juries be protected against arbitrary termination of their term of service by district courts.

. . . .

The legislative history plainly indicates that § 3331 was enacted to permit the convening of special grand juries which would have significant independent authority to determine the length of their service without interference from the courts. In light of the protections provided these special grand juries against *intentional* actions taken by the district court to terminate their service before their business had been completed, we conclude that *it would be contrary to the spirit as well as the letter of the statute to hold [indictments] invalid . . . because of an inadvertent omission by the district court.* Nothing in the legislative history even hints that any provision of § 3331 was designed to protect the individuals investigated by these special grand juries. *Cf. United States v. Pisani*, 590 F. Supp. 1326, 1339 (S.D.N.Y. 1984) [*aff'd in part, reversed in part, and remanded*, 773 F.2d 397, 404-05 (2d Cir. 1985)]. In fact, the entire purpose of the statute is to permit the special grand jury sufficient time to complete [its] investigations of complex matters. We can find no evidence whatsoever in the legislative history that Congress was attempting to legislate the validity of indictments in § 3331. *Cf. United States v. Wallace & Tiernan, Inc.*, 349 F.2d 222, 227 (D.C. Cir. 1965); *Nolan v. United*

States, 163 F.2d 768, 769 (8th Cir. 1947), *cert. denied*, 333 U.S. 846 (1948); *Breese v. United States*, 203 F. 824, 828 (4th Cir. 1913).

Smith, No. 86 CR 272, slip op. at 7-10 (emphasis added).

Defendants contend that we should follow the decisions of the United States Courts of Appeals for the Ninth and Second Circuits holding that improperly extended grand juries were without power to return indictments. *See United States v. Armored Transport, Inc.*, 629 F.2d 1313, 1316 (9th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981); *United States v. Macklin*, 523 F.2d 193, 195 (2d Cir. 1975); *United States v. Fein*, 504 F.2d 1170, 1173 (2d Cir. 1974). These cases are inapplicable here because we hold that as to all but one defendant, the grand juries *were* properly extended. Moreover, these cases are inapposite, because they examined grand juries convened under Federal Rule of Criminal Procedure 6(b), which provides for 18 month terms. The grand juries at issue were purporting to act beyond the term authorized by law and their acts were therefore nullities. Here, by contrast, each of the special grand juries was impaneled pursuant to § 3331, which authorizes a 36 month term.[14] All of the indictments before us were returned within this time period.

It would have been preferable for the Chief Judge to enter an order at the time of these special grand juries' extensions evidencing his determination that they had not completed their work. *See United States v. Marrapese*, 610 F. Supp. 991, 1010 n.6 (D.R.I. 1985), *aff'd on other grounds*, 826 F.2d 145 (1st Cir.), *cert. denied*, 108 S. Ct. 331 (1987). A written order is the best evidence of a judi-

[14] As previously discussed, Congress significantly extended the term of the new special grand juries to increase their investigative capabilities. *See United States v. Lang*, 644 F.2d 1232, 1234 (7th Cir.), *cert. denied*, 454 U.S. 870 (1981). It was clear throughout the congressional debates that these grand juries would serve longer than 18 months. *See, e.g.*, 116 Cong. Rec. 35,311, 35,313, 35,321, 35,328, and 35,332.

cial act. But in the absence of a statutory provision requiring the entry of a written order, the judicial determination alone stands as the operative act of the court. Courts accomplish much of their business without formal memorialization. Moreover, the common law distinguishes between the rendition and the entry of judgment. *See People v. Redman*, 122 Ill. App. 3d 787, 462 N.E.2d 21, 24, 78 Ill. Dec. 305 (1984); Freeman on Judgments §§ 46-49 (1925). *Cf. Speaks v. Brierley*, 417 F.2d 597 (3d Cir. 1969), *cert. denied*, 397 U.S. 1051 (1970) (policy in favor of maintaining the integrity of written record against subsequent oral inquiry into its meaning); Wigmore on Evidence § 2450 (integration of judicial records compulsory). It is the rendition of judgment that is determinative; entry of a notation is merely ministerial. The judicial act of determining whether a special grand jury has completed its work is separate from and prefatory to the ministerial act which reflects it. "That which the court performs judicially . . . is not to be avoided by the action or want of action of the judges or other officers of the court in their ministerial capacity." Freeman on Judgments § 46. Where a supervising judge has failed to enter a written extension order under § 3331, other reliable and unequivocal evidence that he or she actually made the determination in question may suffice.[15] We therefore proceed to examine the sufficiency of this evidence.

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[15] "[W]hile entry is not judgment, its absence tends strongly to indicate that no judgment exists. . . ." Freeman on Judgments § 49. However, unequivocal evidence that the requisite decision was made may be strong enough to overcome the presumption that the absence of an explicit notation from the court record is dispositive. *See United States v. Stofsky*, 527 F.2d 237, 247-48 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976); *Wax v. Motley*, 510 F.2d 318, 321 (2d Cir. 1975); *Marrapese*, 610 F. Supp. at 1010; *Ramsey v. Hand*, 185 Kan. 350, 343 P.2d 225, 233, *cert. denied*, 362 U.S. 970 (1959).

IV.

On February 21, 1987 Chief Judge McGarr signed an order which contained findings of fact and purported to extend the term of the 1983 Grand Jury *nunc pro tunc*. A court may issue a *nunc pro tunc* order to correct the record so that it reflects what was actually done but never recorded due to clerical inadvertence. *See Recile v. Ward*, 496 F.2d 675, 680, *modified on other grounds*, 503 F.2d 1374 (5th Cir. 1974); *Matthies v. Railroad Retirement Board*, 341 F.2d 243, 246-48 (8th Cir. 1965). "The office of a *nunc pro tunc* ('now for then') order is to clean up the records by showing what was previously done with effect from the time done; it is not to alter substantive rights." *King v. Ionization Int'l, Inc.*, 825 F.2d 1180, 1187 (7th Cir. 1987). No formal order was ever entered extending the term of the 1983 Grand Jury; thus the record may not be altered after the fact to show the entry of such an order. Yet, as we have already held, the entry of a formal order was not necessary. We therefore examine Judge McGarr's order solely to determine whether it contains evidence that he made the requisite determination in May of 1986.

Paragraph seven of Judge McGarr's order reads: "I determined prior to May 25, 1986, that the grand jury had additional matters to transact, had not yet completed its business, and should therefore be extended another six months." Judge McGarr's finding is corroborated by the fact that he ordered the 1983 Grand Jury to "resume deliberations" on several occasions in April and May of 1986 and treated it as properly extended. Defendants point out that an assistant U.S. Attorney made a conscious decision not to seek another extension order for the 1983 Grand Jury because he erroneously believed that the previous order, which purported to extend the Grand Jury "until further order of the court," was sufficient. The fact that the U.S. Attorney's office never sought an extension, however, does not contradict Judge McGarr's finding that he was familiar with the work of the Grand Jury and made the requisite determination prior to May 25, 1986.

Judge McGarr made similar findings with regard to the 1984 Grand Jury. Paragraph seven of his March 3, 1987 order states that he "determined in March 1986, that the grand jury had additional matters to transact, had not yet completed its business, and should therefore be extended another six months." Judge McGarr's finding is corroborated by the fact that the 1984 Grand Jury voted in March to continue its work. *See supra* note 8. This evidence suffices to show that the 1984 Grand Jury was properly extended for six months beyond its original term.[16]

Judge McGarr's order therefore indicates that the 1984 Grand Jury was validly extended until October of 1986. The 1984 Grand Jury, however, continued to sit until February of 1987—four months beyond its initial extension. The record before us does not reflect whether a judicial determination was made, prior to the expiration of the 1984 Grand Jury's first extension, that it had unfinished business. Further, it is not clear from the record on which date in October, 1984 the 1984 Grand Jury was impaneled. The Grand Jury indicted Clemenic on October 14, 1986, returned a superseding indictment against him on January 6, 1987, and a second superseding indictment on January 13, 1987. We therefore remand Clemenic's case to the district court for a determination of whether his original indictment was returned less than 24 months after the October 1984 impanelment date; and whether there is any evidence that a judicial determination was made prior to the expiration of its first extension that the 1984 Grand Jury had not finished its business.

[16] The fact that the 1984 Grand Jury did not appear before Judge McGarr from March 18 until April 1, 1986, *Smith*, No. 86 CR 272, slip op. at 3, does not contradict Judge McGarr's finding that he determined in March of 1986 that the Grand Jury had not finished its business. Any district court findings that Judge McGarr did not make the requisite determination are clearly erroneous.

V.

In summary, we hold that the Special December 1983 Grand Jury was validly extended until December 2, 1986 and the Special October 1984 Grand Jury was validly extended until 24 months from the date of its impanelment. The Grand Juries were thus properly constituted at the time they returned indictments against defendants Taylor, Nigo-Martinez, Jaraba, Wilson, Rosenstein and Sanders, and these defendants' convictions are not on this account invalid. We remand for a determination of whether, consistent with this opinion, any of Clemenic's indictments were valid.

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APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Assigned Judge: **WILLIAM T. HART**

Case Number: 86 CR 339 - 2, 3

Date: May 28, 1987

Case Title: *United States v. BILLS, et al.*

MOTION: (In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented.)

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

Judgment is entered as follows:

Pursuant to Memorandum Opinion and Order, IT IS ORDERED that: (1) The judgments of convictions, the sentences and the pleas of guilty heretofore entered with respect to defendants Rosenstein and Sanders are vacated. (2) The motions of defendants Rosenstein and Sanders to dismiss the indictment against them returned on September 22, 1986 are granted and the indictment is dismissed as to said defendants for irregularity with respect to the Special December 1983 grand jury. (3) Defendants are subject to reindictment, pursuant to Sections 3288 and 3289, Title 18, United States Code.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

CHARLES BILLS, a/k/a GUY BILLS, JERRY ROSENSTEIN, DONALD SANDERS, AND CHARLES SOTERAS,
Defendants.

No. 86 CR 339-2 and 3

MEMORANDUM OPINION AND ORDER

This matter is before the court after sentencing on the motions of defendants Rosenstein and Sanders to vacate their guilty pleas, set aside their sentences and to dismiss the indictment returned against them because the term of the Special December 1983 Grand Jury ("the grand jury") which returned the indictments against them was not properly extended.

Four defendants were sentenced in the proceeding. Defendant Guy Bills, by his attorney, filed a statement with the court on May 8, 1987 stating after being advised by counsel of the matter before the court that he does not desire "to challenge the integrity of the Special December, 1983 Grand Jury and to allow the finding of guilty entered on October 24, 1986 to stand." Defendant Soteras has been notified of this proceeding but has not filed any motion to vacate his plea of guilty or to dismiss the indictment.

The grand jury here involved was empaneled pursuant to Section 3331, Title 18, United States Code, which provides for the summoning of "a special grand jury" when so

required by the Attorney General, or certain of his subordinates, in a district of this size. Such a grand jury "shall serve for a term of eighteen months unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by a majority vote that its business has been completed. If, at the end of such term or any extension thereof the district court determines the business of the grand jury has not been completed the court may enter an order extending such term for an additional period of six months. No special grand jury term so extended shall exceed thirty-six months . . . ."

The grand jury was convened on December 2, 1983. On May 20, 1985, the court entered an order extending the service of the grand jury "until further order of this Court." On November 25, 1985, the court entered another order extending the service of the grand jury "until further order of this Court." No subsequent order was entered further extending the service of the grand jury. The grand jury purportedly continued to serve until November 1986. On April 28, 1986, the grand jury returned a seven count indictment naming defendants with violations of Title 18, United States Code, Sections 1962 (c) and (d), and 2314. On September 22, 1986, the grand jury returned an eight count superceding indictment against defendants, charging the same offenses as in the original indictment and adding Count Eight charging defendants with conspiracy to defraud the United States. Defendants entered pleas of guilty to certain counts of the superceding indictment and judgment was entered on January 28, 1987. The original indictment and the remaining counts of the superceding indictment were dismissed on motion and by agreement. (The original indictment cannot therefore be relied upon to provide jurisdiction).

Defendants contend that the grand jury's term of service expired on May 25, 1986, six months after the November 25, 1985, order to extend its term of service

was entered. They argue that the superceding indictment, which was returned on September 22, 1986, was not returned by a legally authorized grand jury and is null and void.

The last extension ordered by the Chief Judge was entered on November 25, 1985. On February 21, 1987, the Chief Judge entered an order *nunc pro tunc* extending the grand jury from May 25, 1986, to November 25, 1986. However, the grand jury transcript of June 9, 1986, and the June 10, 1986, Memorandum of the Chief of the Special Prosecution Division of the U.S. Attorneys Office, show that the issue was not presented to the court at that time, even though the subject of extension was raised by a juror.

Nunc pro tunc orders are only a means to regularize, as a matter of record, court orders that were in fact entered in the past but that, due to some clerical oversight, did not find their way into the record. They cannot correct for a court's failure to act. *Recile v. Ward*, 496 F.2d 675, 680 (5th Cir. 1974); *United States v. Lytle*, No. 87 CR 135, slip op. at 12-13 (N.D. Ill. April 15, 1987).

Although the order of November 25, 1985, purported to attend the term of service "until further order," § 3331(a) only allows a court to extend the term of a special grand jury "for an additional period of six months." Therefore an additional extension, which would have been permitted under the statute, was required in order for the grand jury to serve beyond May 25, 1986. *United States v. Lytle*, No. 87 CR 135, slip op. (N.D. Ill. April 15, 1987) (Shadur, J.).

Another member of this court has addressed the question here presented with respect to an indictment returned by the October 1984 Special Grand Jury in *United States v. Smith*, No. CR 272-2, slip op. (N.D. Ill. May 20, 1987) (Plunkett, J.). *Smith*, the focus is on the operative language of § 3331(a), which provides that "[i]f, at the end of [the] ter.n . . . , the district court determines the business

of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months." *Smith* holds that the only *requirement* for purposes of extending a grand jury was a determination that the grand jury's business was not complete:

> We read that sentence [from the statute] to require, for jurisdictional purposes, that the district court make a determination at the end of the special grand jury's term that the business of the grand jury has not been completed. It is this determination by the court that establishes the legitimacy of the grand jury and thus empowers it to return valid indictments. If the district court makes a determination that the business of the grand jury has not been completed, the statute then authorizes an extension. If such a determination cannot be made, then an extension would be unauthorized. Accordingly, in extending the special grand jury's term, what is important for purposes of the court's jurisdiction is the *determination* made by the court, not a formal order actually extending the term of service of the grand jury.

Smith, slip op. at 4.

Accepting the rationale of the *Smith* case that, "what is important for purposes of the court's jurisdiction is the *determination* made by the court" that "the *business* of the grand jury *has not been completed*," there is no basis in this case for a conclusion that such a determination was ever made. The most that can be said on this record is that no actions were taken by the court that were inconsistent with a continuation of the grand jury's service. But that is not enough. Had such determinations been made before the expiration of the regular and extended terms of the grand jury, it is arguable that the entry of formal orders of extension could have occurred at a later date without being entered *nunc pro tunc*. However, the government has failed to prove compliance with this statutory requirement before the extended period in which the superceding indictment was returned. Therefore the grand jury was

not properly constituted and the superceding indictment was and is a nullity in this case. *United States v. Macklin*, 523 F.2d 193, 195 (2d Cir. 1975); *United States v. Fein*, 504 F.2d 1170, 1178 (2d Cir. 1974); *United States v. Johnson*, 123 F.2d 111, 120 (7th Cir. 1941), *rev'd on other grounds*, 319 U.S. 503 (1943); *United States v. Lytle*, *supra*, slip op. at 13; *contra United States v. Mitchell*, 389 F. Supp. 917, 919-20 (D.D.C. 1975), *aff'd*, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977); *Shimon v. United States*, 352 F.2d 449, 451 (D.C. Cir. 1965).

The defect or irregularity with respect to the indictment found in this case is such that any period of limitations otherwise applicable will be extended for six months by operation of either § 3288 or § 3289 of Title 18, United States Code.

IT IS THEREFORE ORDERED as follows:

(1) The judgments of convictions, the sentences and the pleas of guilty heretofore entered with respect to defendants Rosenstein and Sanders are vacated.

(2) The motions of defendants Rosenstein and Sanders to dismiss the indictment against them returned on September 22, 1986 are granted and the indictment is dismissed as to said defendants for irregularity with respect to the Special December 1983 Grand Jury.

(3) Defendants are subject to reindictment, pursuant to Sections 3288 and 3289, Title 18, United States Code.

ENTER:

/s/ WILLIAM T. HART

UNITED STATES DISTRICT JUDGE

Dated: May 28, 1987

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Assigned Judge:	**WILLIAM T. HART**
Case Number:	86 CR 339 - 2 and 3
Date:	June 12, 1987
Case Title:	*United States of America v. Bills*

MOTION: (In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3d-party plaintiff, and (b) state briefly the nature of the motion being presented.)

DOCKET ENTRY: (The balance of this form is reserved for notations by court staff.)

[Other docket entry:]

Government's motion for reconsideration of order dismissing indictment is denied. (See reverse for details.)

On May 28, 1987, this court vacated the convictions and pleas of guilty of defendants Rosenstein and Sanders and dismissed the indictment as to those defendants on the ground that at the time the Special December 1983 Grand Jury returned the operative indictment it was no longer a legally constituted grand jury and the indictment was therefore null and void. This court explained:

> Accepting the rationale of the *Smith* case, that "what is important for purposes of the Court's jurisdiction is the *determination* made by the court" that "the *business* of the grand jury has not been completed," there is no basis in this case for a conclusion that such a determination was ever made. The most that can be said on this record is that no actions were taken by the Court that were inconsistent with the continuation of the grand jury's service. But that is not enough.

The government now moves for reconsideration, contending that the record of proceedings before the Chief Judge both before and after the time at which such a determination was required show that the Chief Judge did in fact make the required determination. The government submits transcripts of six occasions on which the grand jury returned indictments, three before the critical date of May 25, 1986, and three after. On each occasion the Chief Judge received the indictments and made the following remarks:

April 28, 1986 - THE COURT: Thank you, all. Resume you deliberations.

May 5, 1986 - THE COURT: Any problems with your fine grand jury?

THE FOREMAN: No, your Honor.

THE COURT: Good. All right. Resume your deliberations.

THE FOREMAN: Thank you.

May 12, 1986 - THE COURT: Everthing under control?

THE FOREMAN: Yes, your Honor.

THE COURT: Good. Resume your deliberations. Thank you.

June 2, 1986 - THE COURT: Everthing under control with your Grand Jury?

THE FOREPERSON: Yes, sir.

THE COURT: Good. Fine. Resume your deliberations.

June 9, 1986 - THE COURT: Thank you. Resume your deliberations.

THE FOREPERSON: Thank you.

June 16, 1986 - THE COURT: How are things going with your Grand Jury?

THE FOREPERSON: Fine, your Honor.

THE COURT: Today is a lovely day out. Maybe if you finish your work, we can all get out of here. Resume your deliberations.

THE FOREPERSON: Thank you, your Honor.

These remarks do not demonstrate that the court "determined" that the business of the grand jury had not been completed for purposes of 18 U.S.C. section 3331 (a). Such a determination would require that the issue of the expiration or extension of the grand jury be raised (perhaps even by the court, sua sponte) and a conscious decision be made that its work was not complete. These transcripts show only that the Chief Judge *assumed* that the grand jury would continue. The government's interpretation would find that the Chief Judge extended the grand jury's term every week, regular as clockwork. This cannot be.

THEREFORE IT IS ORDERED that the government's motion for reconsideration is denied.

DATE: June 12, 1987 ENTER: /s/ WILLIAM T. HART

APPENDIX D

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

March 15, 1988

Before

Hon. RICHARD A. POSNER, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

No. 87-2023 *vs.*

JERRY ROSENSTEIN and DONALD SANDERS,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 86 CR 339

The Honorable **William T. Hart,** Judge Presiding.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by defendants-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Supreme Court, U.S.
FILED
JUN 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 87-1872, 87-6673, and 87-6898

In the Supreme Court of the United States

OCTOBER TERM, 1987

JERRY ROSENSTEIN AND DONALD SANDERS, PETITIONERS

v.

UNITED STATES OF AMERICA

ANTONIO NIGO-MARTINEZ AND
SALVADOR JARABA, PETITIONERS

v.

UNITED STATES OF AMERICA

JERALD WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the term of a special grand jury convened under 18 U.S.C. 3331 is extended where, before the grand jury's term expires, the district court determines that the grand jury has not completed its investigation but fails to enter a formal written order reflecting that determination.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1872

JERRY ROSENSTEIN AND DONALD SANDERS, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 87-6673

ANTONIO NIGO-MARTINEZ AND
SALVADOR JARABA, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 87-6808

JERALD WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 841 F.2d 1300.[1]

[1] "Pet. App." refers to the appendix to the petition in No. 87-1872.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 1988. A petition for rehearing was denied on March 15, 1988. The petition for a writ of certiorari in No. 87-1872 was filed on May 16, 1988. The petition for a writ of certiorari in No. 87-6673 was filed on March 23, 1988. The petition for a writ of certiorari in No. 87-6808 was filed on April 16, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On September 22, 1986, the Special December 1983 Grand Jury sitting in the Northern District of Illinois returned a superseding indictment charging petitioners Rosenstein and Sanders (No. 87-1872) and others with various offenses, including conspiracy to steal, dismantle, and transport automobiles and parts, in violation of 18 U.S.C. 1962 and 2314. Both petitioners pleaded guilty to two counts of the indictment in December 1986, and each was sentenced to eight years' imprisonment, to be followed by five years' probation. On November 17, 1986, the same grand jury returned an indictment charging petitioner Wilson (No. 87-6808) with making false statements to the government, in violation of 18 U.S.C. 1001, and with obstructing justice, in violation of 18 U.S.C. 1503. After a jury trial, he was convicted on all counts. On July 22, 1986, the Special October 1984 Grand Jury sitting in the Northern District of Illinois returned a two-count indictment charging petitioners Jaraba and Nigo-Martinez (No. 87-6673) with conspiracy to possess and distribute cocaine, in violation of 21 U.S.C. 846, and possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a). Following a jury trial, each was convicted on both

counts and was sentenced to concurrent terms of five years' probation on each count.

1. The Special December 1983 Grand Jury was convened on December 2, 1983, pursuant to 18 U.S.C. 3331. Prior to the expiration of the initial 18-month term, Chief Judge McGarr entered a written order, dated May 25, 1985, that effectively extended the grand jury's term for six months. Prior to the expiration of that extension, Chief Judge McGarr entered another written order, dated November 25, 1985, that effectively extended the grand jury's term for an additional six months.[2] Chief Judge McGarr did not enter a third formal written order extending the grand jury's term prior to the expiration of the second extension on June 2, 1986. The grand jury, however, continued to meet and to return indictments after that date, including the indictments on which petitioners Rosenstein, Sanders, and Wilson were convicted. On several occasions both prior to and after June 2, Chief Judge McGarr instructed the grand jury to resume deliberations.

The Special October 1984 Grand Jury was convened pursuant to 18 U.S.C. 3331 in October 1984. In March 1986, prior to the expiration of its initial 18-month term in April, the grand jury voted unanimously to continue its work. No formal written order extending the grand jury's term was entered, although the grand jury continued to appear weekly before Chief Judge McGarr (and later Judge Grady) for ten months after the expiration of the 18-month term. It returned the indictment against petitioners Jaraba and Nigo-Martinez in July 1986.

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[2] The orders stated that the grand jury term was extended "until further notice," but the statute provides for only six-month extensions (18 U.S.C. 3331(a)).

Following the discovery that there were no written orders extending the Special December 1983 Grand Jury and the Special October 1984 Grand Jury, the United States Attorney's Office presented corrective nunc pro tunc orders to Chief Judge McGarr.[3] With respect to the Special December 1983 Grand Jury, Chief Judge McGarr entered a nunc pro tunc order on February 21, 1987, stating that he had determined prior to May 25, 1986, that the grand jury had not completed its work (Pet. App. 7a n.10). With respect to the Special October 1984 Grand Jury, Chief Judge McGarr entered a nunc pro tunc order on March 3, 1987, stating that he had determined in March 1986 that the grand jury had not completed its work (*id.* at 9a n.11).

2. In April 1987, petitioners Rosenstein and Sanders moved to set aside their convictions, to vacate their sentences, and to dismiss the indictment against them. They argued that the Special December 1983 Grand Jury was without authority to indict when it returned the indictment on September 22, 1986, because there was no written order extending its term beyond the expiration of the second extension on June 2, 1986. On March 26, 1987, petitioner Wilson moved to dismiss the indictment and to vacate his judgment of conviction on the same ground, because he had been indicted by the Special December 1983 Grand Jury on November 17, 1986. The district court granted both motions, and the government appealed.

In April 1987, petitioners Jaraba and Nigo-Martinez moved to vacate their convictions and to preclude further prosecution. They argued that the Special October 1984 Grand Jury was without authority to indict when it re-

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[3] As the court of appeals noted (Pet. App. 3a, 4a n.2), a similar problem exists with the Special January 1985 Grand Jury convened in the Northern District of Illinois.

turned the indictment against them on July 22, 1986, because there was no written order extending the grand jury's term beyond the expiration of the initial 18-month period in April 1986. The district court denied the motion, and petitioners appealed.

3. The court of appeals held the indictments valid (Pet. App. 1a-20a). The court ruled that the terms of both special grand juries had been properly extended under 18 U.S.C. 3331(a) at the times the indictments against petitioners were returned. The court first concluded that Section 3331(a) extends the special grand jury's term whenever the district court makes a determination prior to the expiration of the grand jury's term that the grand jury has not completed its business. Thus, the statute "requires only this judicial determination—not the ministerial act of memorializing it by formal order—to effect the valid extension of a special grand jury" (Pet. App. 13a).

The court reasoned that this view is in accord with the statutory language,[4] if read not with " 'slavish literalism' " but with an eye toward discerning the statute's purpose based on the "statute as a whole" and its history (Pet. App. 13a (citation omitted)). The court explained (*id.* at 13a-15a) that Section 3331 was deliberately written to give the special grand juries, which were created to investigate

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[4] Section 3331(a) states in pertinent part:

> The grand jury shall serve for a term of eighteen months unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by majority vote that its business has been completed. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No special grand jury term so extended shall exceed thirty-six months, except as provided in [Section 3333(e)].

complex organized crime offenses, an unusually long tenure (as much as 36 months, rather than the ordinary 18-24 months under Fed. R. Crim. P. 6(g)) and an unusual degree of independence from the supervising court: the statute thus grants such a special grand jury protection against involuntary termination by the court, allowing the grand jury to take an appeal to the chief judge of the circuit if the district court orders it discharged or fails to extend its term (18 U.S.C. 3331(b)). Since such a grand jury is protected against intentional unwarranted disruptions by the district court, the court pointed out, the statute could not sensibly be construed to deprive the grand jury (and its indictments) of protection against a mere inadvertent omission by the district court, such as a failure to enter a written order memorializing the court's determination that an extention of the grand jury's term is warranted. Hence, the court concluded (Pet. App. 16a-17a), although it would have been preferable for the district court to enter an order at the time of the extensions, the mere absence of a contemporaneous written order was not fatal if there was other "reliable and unequivocal" evidence establishing that the district court actually made the determination that the special grand jury had not finished its business.

The court of appeals found (Pet. App. 18a-19a) the required proof that the district court here had made the determinations that were required to extend each special grand jury's term. Based on the order of February 21, 1987, the court concluded (*id.* at 18a) that the district judge had made a finding prior to May 25, 1986, that the Special December 1983 Grand Jury had not completed its investigation. The court of appeals similarly concluded (*id.* at 19a) that the order of March 3, 1987, established that the district judge had made a finding in March 1986

that the Special October 1984 Grand Jury had not finished its business. Accordingly, the court of appeals held (*id.* at 20a) that "the Special December 1983 Grand Jury was validly extended until December 2, 1986 and the Special October 1984 Grand Jury was validly extended until 24 months from the date of its impanelment," and the indictments against petitioners were therefore valid.[5]

ARGUMENT

These cases present a question of first impression involving the construction of 18 U.S.C. 3331(a). The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or of any other court of appeals. In addition, the narrow issue presented here is not likely to arise often. Further review by this Court is therefore unwarranted.

1. Petitioners renew their contention (87-1872 Pet. 7-11; 87-6673 Pet. 3-4; 87-6808 Pet. 3-5) that the district court's failure to enter an order extending the term of the special grand juries convened under 18 U.S.C. 3331(a) deprived the special grand juries of the power to return valid indictments. That contention is incorrect.

To begin with, the court of appeals adopted the most reasonable construction of Section 3331(a)—that what operates to extend the term of a special grand jury is the

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[5] The court noted (Pet. App. 5a n.3, 19a) that it was unclear from the record on which date in October 1984 the Special October 1984 Grand Jury was empaneled. Because one defendant who is not a petitioner here was originally indicted on October 14, 1986, which might have been beyond the first extension, and was the subject of two superseding indictments that were returned in January 1987, the court remanded the case for a determination of the empanelment date and whether a judicial finding had been made prior to the expiration of the first extension that the grand jury had not finished its business.

district court's determination that the grand jury's work is not completed, rather than the ministerial act of formally memorializing that determination. Although Section 3331(a) plainly envisions that entry of a judicial order will ordinarily be the means by which the term of a special grand jury is extended, the statute does not by its terms strictly require such an order for a valid extension, let alone an order contemporaneous with the judicial determination that the grand jury has not completed its business. As the court of appeals explained, "in the absence of a statutory provision requiring the entry of a written order," the statute is most sensibly read to make the judicial determination itself, as proved by reliable evidence, "the operative act of the court" (Pet. App. 17a).

The judicial determination fulfills the purpose of the statute—to ensure that a special grand jury is not allowed to continue past a specified time without an independent check on its progress toward completion of its work. It is the judicial determination that provides that check. The act of memorializing the determination in an order is purely ministerial. Although such an order is the best evidence that the determination was made, its significance is only evidentiary. But where, as here, there is other "reliable and unequivocal" evidence (Pet. App. 17a) that the determination was in fact made (based on the court's later findings and the fact that the court repeatedly had the grand juries resume deliberations both before and after the date on which extensions were needed), the statutory requirement is satisfied.

Reading Section 3331(a) to render a special grand jury's actions void because of the district court's inadvertent failure to perform a ministerial task would be contrary to the overall statutory design. As the court of appeals ob-

served (Pet. App. 14a-15a), Section 3331, which was enacted as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, gives enhanced powers to the special grand juries established to investigate organized crime: it permits them to serve for longer periods and gives them a greater degree of independence from their supervising courts than regular grand juries (see Fed. R. Crim. P. 6). Thus, in addition to allowing the special grand jury's term to be extended up to 36 months, Section 3331(a) provides that a special grand jury may not be discharged before it has served its initial 18 months unless the grand jury itself determines that it has finished its business and the court enters an order for its discharge. At the same time, Section 3331(b) protects the grand jury against the district judge's erroneous actions by providing a mechanism for the grand jury to appeal to the chief judge of the circuit if a district judge discharges the grand jury early or fails to extend its term when its business remains unfinished.

It would be inconsistent with the autonomy established by those provisions to invalidate the work of such a grand jury because of the district court's failure to perform a ministerial act recording an otherwise valid determination that the grand jury should continue, especially when the grand jury has repeatedly been directed to resume deliberations.[6] As the court of appeals reasoned (Pet.

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[6] As the court of appeals observed (Pet. App. 14a (emphasis in original)), the language of Section 3331(b) also suggests that entry of a written order of extension should not be determinative under Section 3331(a). Subsection (b) conditions the grand jury's right to appeal to the chief judge on "the entry of an order in the case of the *discharge* of a grand jury * * *, [but] it mentions no such requirement in the case of an *extension*." The provision thus allows an appeal from a "fail[ure] to extend the term" (18 U.S.C. 3331(b)), not from a "failure to enter an order extending the term."

App. 14a), it makes no sense to read Section 3331(a) as subjecting the grand jury to disruption because of mere oversight by the district court when the grand jury is protected against even intentional disruptions by the court. Indeed, while an intentional failure to extend the grand jury's term would presumably come to the attention of the grand jury and therefore be subject to correction through an appeal to the chief judge of the circuit, a district court's failure to enter an order would presumably not be noticed by the grand jury, especially if it continues to report to the court and the court continues to direct it to resume deliberations. In that circumstance, the opportunity for corrective action is not present, and it is even less appropriate to invalidate the grand jury's actions.

For those reasons, the court of appeals reasonably construed Section 3331(a) to mean that a special grand jury's term is extended whenever, as proved by a written order or by "other reliable and unequivocal evidence" (Pet. App. 17a), the supervising court makes the required determination that the grand jury has not completed its business. Because it was clearly established that that determination was made in these cases, the terms of the special grand juries were properly extended. There was therefore no error in the grand jury's return of the indictments.

In any event, even if Section 3331(a) were construed to require a written order for a proper extension of the grand jury, the judgment of the court of appeals would nonetheless be correct. Any such error was harmless and should be disregarded under Fed. R. Crim. P. 52(a). This is not a case in which a grand jury returns an indictment after an absolute statutory limit on its tenure has been exceeded. Here, the grand jury was acting well within the 36 months allowed by 18 U.S.C. 3331. Moreover, there was "reliable and unequivocal" proof that the determination required by the statute was in fact made by the district court.

The only deficiency was the absence of a formal order memorializing that determination.[7] The failure to enter such an order did "not affect substantial rights" of petitioners and is therefore no ground for dismissing the indictments and overturning petitioner's convictions (Fed. R. Crim. P. 52(a)). See Rule 52(a) advisory committee note (noting that the rule is "a restatement of existing law," citing 18 U.S.C. (1940 ed.) 556, which said that "[n]o indictment * * * shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant").

2. Petitioners also contend (87-1872 Pet. 12; 87-6673 Pet. 4) that the decision of the court of appeals conflicts with the decisions of the Second Circuit in *United States* v. *Fein*, 504 F.2d 1170 (1974), and *United States* v. *Macklin*, 523 F.2d 193 (1975), and with the decision of the Ninth Circuit in *United States* v. *Armored Transport, Inc.*, 629 F.2d 1313 (1980), cert. denied, 450 U.S. 965 (1981). That contention is wholly without merit. The cited decisions held only that a regular grand jury is without power to return a valid indictment after the expiration of the absolute, non-extendable time it is permitted to sit; the lapse of such time, of course, is an incurable defect.[8] Those

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[7] This case does not involve an error committed before the grand jury or any question about the effect of such an error on its decision to return an indictment or on a subsequent conviction. Cf. *United States* v. *Mechanik*, 475 U.S. 66 (1986).

[8] At the time of those decisions, regular grand juries were limited by Rule 6, Fed. R. Crim. P., to 18-month terms, which could not be extended. Rule 6(g) was amended in 1983 to allow extensions of a regular grand jury's term. The Rule currently provides:

> A grand jury shall serve until discharged by the court, but no grand jury may serve more than 18 months unless the court ex-

decisions are irrelevant to whether, as the court of appeals held, the term of a special grand jury is properly extended by the required judicial determination without a formal written order. And none of those decisions involved an error that was harmless because it could be fully corrected by a purely ministerial act.[9]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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tends the service of the grand jury for a period of six months or less upon a determination that such extension is in the public interest. * * *

See Fed. R. Crim. P. 6 advisory committee note (1983 Amendment).

[9] In the *Armored Transport* case, the court held that the invalidity of the indictment did not require reversal of the convictions because the prosecution could have proceeded by information.

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